

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: February 27, 2007)

DO NOT PUBLISH

MARGARET JEAN THOMAS,	)	
as legal representative of her minor child,	)	
MARIAH JENA' RYCE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 04-1159V
	)	
SECRETARY OF	)	
HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	
	)	

RULING ON STATUTE OF LIMITATIONS<sup>1</sup>

Petitioner, Margaret Jean Thomas (Ms. Thomas), as the legal representative of her daughter, Mariah Jena' Ryce (Mariah), seeks compensation under the National Vaccine Injury Compensation Program (Program).<sup>2</sup> Appearing *pro se*, Ms. Thomas filed a Program petition on July 16, 2004. *See generally* Petition (Pet.). Mariah suffers relapsing neuromyelitis optica (Devic's disease), a devastating condition marked by "demyelinating isolated optic nerve and spinal cord lesions." Respondent's exhibit (R. ex.) H at 7. Ms. Thomas relates Mariah's Devic's disease to a diphtheria-

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<sup>1</sup> Because this ruling contains a reasoned explanation for the special master's action in this case, the special master intends to post this order on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Therefore, as provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" order will be available to the public. *Id.*

<sup>2</sup> The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

tetanus-acellular pertussis (DTaP) vaccination that Mariah received on June 29, 2001, when she was four years old. *See* Pet. at 1; Petitioner’s exhibit (Pet. ex.) 2 at 1.<sup>3</sup> According to Ms. Thomas, Mariah exhibited symptoms of her Devic’s disease “within 2 (two) weeks” following the June 29, 2001 vaccinations, “on or about July 17, 2001.” Pet. at 1. In particular, Ms. Thomas asserts that Mariah reported on July 16, 2001, that “she was ‘seeing rain.’” Pet. ¶ 3, citing Pet. ex. 3 at 1.

On January 10, 2006, respondent proffered a medical expert’s opinion from Gerald V. Raymond, M.D. (Dr. Raymond). *See generally* R. ex. H. Dr. Raymond is certified in neurology, with special competence in child neurology, by the American Board of Psychiatry and Neurology. *See* R. ex. I at 2. He is an associate professor of neurology at Johns Hopkins School of Medicine. *See* R. ex. H at 6. Dr. Raymond states that Mariah’s description of “seeing rain” represents a “characterization of a visual change” by “a four[-]year old child,” heralding the onset of Mariah’s Devic’s disease. R. ex. H at 7; *see also* R. ex. H at 6. In Dr. Raymond’s view, Mariah’s medical records that are “contemporaneous” with Mariah’s description of “seeing rain” indicate that Mariah’s visual symptoms “occurred one day prior to her being seen” by an ophthalmologist on July 17, 2001, *i.e.*, July 16, 2001. R. ex. H at 7.

Relying upon *Cucuras v. Secretary of HHS*, 993 F.2d 1525, 1528 (Fed. Cir. 1993)(Medical records that are “generally contemporaneous” to “medical events” deserve “consideration as “trustworthy evidence.”), respondent endorses Dr. Raymond’s conclusion that Mariah experienced the first symptom or manifestation of onset of her Devic’s disease on July 16, 2001. *See, e.g.*, Transcript (Tr.), filed February 6, 2007, at 7; Status Report, filed January 27, 2006, at 3. As a consequence, respondent accepts apparently that Ms. Thomas filed her petition within the limitations period contained in § 300aa-16(a)(2).<sup>4</sup> *See, e.g.*, Status Report, filed January 27, 2006, at 3. Nevertheless, respondent notes that several of Mariah’s medical histories attributed to Ms. Thomas, as well as an affidavit that Ms. Thomas filed on July 26, 2005, suggest that Mariah sustained the first symptom or manifestation of onset of visual difficulties associated with Devic’s disease *before* July

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<sup>3</sup> Mariah received also inactive polio vaccine (IPV) and a measles-mumps-rubella (MMR) immunization on June 29, 2001. *See* Pet. ¶ 2; Pet. ex. 2 at 1.

<sup>4</sup> Section 300aa-16(a) provides:

In the case of—

(2) a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset . . . of such injury.

16, 2001, implicating the limitations period contained in § 300aa-16(a)(2). *See* Respondent's Report (Report), filed September 2, 2005, at 5-7; *see also* Status Report, filed January 27, 2006, at 1-2. For instance, in October 2001, Alan K. Percy, M.D. (Dr. Percy), recorded that at "age four," Mariah appeared "not to be looking at mom and dad" and was "bumping into her bed post," prompting an ophthalmological evaluation on July 17, 2001. R. ex. F at 1124; *see also* R. ex. F at 715-16, 913, 1127. Then, in June 2002, Jane Ness, M.D. (Dr. Ness), recorded that Mariah "seemed to have some difficulty seeing" during the "week" following her "4-year-old shots on June 29, 2001." R. ex. F at 368; *see also* R. ex. F at 208. Dr. Ness understood that an ophthalmologist examined Mariah "when her vision seemed to worsen" approximately "one month later." R. ex. F at 368; *see also* R. ex. F at 208. In July 2004, Dr. Ness echoed the history, recording that "shortly after having her 4-year-old immunizations," perhaps even "within a day or so of her shots," Mariah "developed visual loss." R. ex. F at 1482. Finally, in her affidavit, Ms. Thomas attests that she "notice[d] a difference in Mariah's eyes" following Mariah's June 29, 2001 vaccinations. Affidavit of Mariah Jena' Ryce [sic] (Thomas Affidavit), filed July 26, 2005, at 1. In one sentence, Ms. Thomas uses two general terms and a specific date to describe the temporal relationship between Mariah's June 29, 2001 vaccinations and Mariah's visual symptoms: "[i]mmediately;" "within two weeks;" and "July 14, 2001." *Id.* (emphasis added). Thus, respondent submits that the petition, Mariah's medical records and Ms. Thomas's affidavit present "a question of fact" regarding the occurrence of "the first sign or symptom of Mariah's condition" for purposes of the limitations period contained in § 300aa-16(a)(2). Status Report, filed January 27, 2006, at 4.

Given the factual issues presented by the petition, Mariah's medical records and Ms. Thomas's affidavit, respondent recognizes rightly that respondent cannot waive the operation of the statute of limitations. *See* Status Report, filed January 27, 2006, at 4; *see also* *Flannery v. Secretary of HHS*, No. 99-0963V, 2003 WL 1699396, at 2, n.3 (Fed. Cl. Spec. Mstr. Mar. 14, 2003), citing Charles Alan Wright, *HANDBOOK ON THE LAW OF FEDERAL COURTS* 15-16 (2d ed. 1970) ("Parties cannot confer on a federal court jurisdiction that has not been vested in the court by the Constitution and Congress."). And, of course, the special master is responsible for ensuring that he possesses the authority to "adjudicate the merits of" Ms. Thomas's case. *Martin v. Secretary of HHS*, 62 F.3d 1403, 1407 (Fed. Cir. 1995). Therefore, the special master convened a hearing limited to narrow factual issues affecting the special master's jurisdiction over the petition. Ms. Thomas testified.

The special master observed carefully Ms. Thomas during direct examination and cross-examination. The special master interrogated intently Ms. Thomas. The special master assessed critically Ms. Thomas's demeanor and credibility. He determines that Ms. Thomas was forthright and guileless. After considering the record as a whole, the special master accords great evidentiary weight to information contained in the record from Mariah's July 17, 2001 ophthalmological evaluation and to Ms. Thomas's hearing testimony, and the special master discounts information contained in records from Mariah's subsequent medical treatment in October 2001, June 2002 and July 2004. As a consequence, the special master concludes that Mariah sustained the first symptom or manifestation of onset of her Devic's disease on July 16, 2001. Therefore, the special master rules that Ms. Thomas filed her Program petition within the limitations period contained in § 300aa-16(a)(2). The special master explains briefly his decision.

On June 29, 2001, Mariah presented to American Family Care for a routine examination. *See* Pet. ex. 2 at 1-3. Medical personnel preformed vision screening. *See* Pet. ex. 2 at 3. Mariah passed the vision screening at all levels. *See* Pet. ex. 2 at 3; *see also* Pet. ex. 2 at 2. Thus, Mariah's vision appeared normal on June 29, 2001. Mariah received her DTaP vaccination, her IPV and her MMR immunization. *See* Pet. ex. 2 at 1.

On July 17, 2001, Mariah presented as a "new" patient to the University of Alabama Ophthalmology Service Foundation. R. ex. K at 34. In registering Mariah for medical care, Ms. Thomas stated that Mariah had said that "she sees spots [and] can't see." *Id.* Ms. Thomas informed medical personnel that Mariah indicated that "she was 'seeing rain' when looking at [a] clock." Pet. ex. 3 at 1. Ms. Thomas added that Mariah held "books close." *Id.* Ms. Thomas related an acute onset of symptoms, placing the complaints on July 16, 2001, rather than a gradual onset of symptoms over the course of several weeks. *See id.* At hearing, Ms. Thomas confirmed under oath that Mariah did not exhibit the slightest problem with sight between June 29, 2001, and July 16, 2001. *See, e.g.,* Transcript (Tr.), file February 6, 2007, at 23, 26, 30-31, 45.

The special master has balanced Mariah's July 17, 2001 ophthalmological examination record and Ms. Thomas's hearing testimony against Mariah's later medical records, especially Mariah's medical records from October 2001, June 2002 and July 2004, and against Ms. Thomas's affidavit. The special master notes that Mariah's medical records from October 2001, June 2002 and July 2004 do not mention at all the predominant feature of Mariah's presentation in July 2001—Mariah's visual disturbance depicted as "seeing rain"—that caused Ms. Thomas to schedule expeditiously an appointment for Mariah at the University of Alabama Ophthalmology Service Foundation. *See, e.g.,* R. ex. F at 208, 368, 715-16, 913, 1124, 1127, 1482. Thus, at the outset, the special master questions naturally the accuracy of the histories in Mariah's medical records from October 2001, June 2002 and July 2004. Moreover, the chronology reflecting that an ophthalmologist evaluated Mariah approximately one month following Mariah's June 2001 vaccinations contained in Mariah's June 2002 medical record is clearly skewed. *See, e.g.* R. ex. F at 208, 368. Mariah's medical records establish that Mariah's first ophthalmological examination occurred just 18 days after Mariah's June 29, 2001 vaccinations, well less than one month's time. The variance in Mariah's medical records from October 2001, June 2002 and July 2004—generated months to years after Mariah's first visual complaint—supports Ms. Thomas's admission at hearing that she provided "casual" or loose, rather than precise, time frames when relating details about Mariah's condition to several of Mariah's treating physicians. Tr. at 27, 38, 44. Likewise, it does not defy credulity to believe that Ms. Thomas committed a typographical error in the affidavit that she prepared as a lay person under deadline pressure, substituting July 14, 2001, when she meant really July 16, 2001. *See, e.g.,* Tr. at 42-43.

The special master deems the medical record that is most contemporaneous to the onset of Mariah's condition to be far more reliable than subsequent medical records. Thus, the special master determines that Mariah exhibited the first manifestation of her Devic's disease on July 16, 2001. Therefore, the special master holds that Ms. Thomas filed her petition within the statute of limitations contained in § 300aa-16(a)(2).

The special master will schedule further proceedings, including Ms. Thomas's substantive medical investigation of the case, by separate order.

s/John F. Edwards  
John F. Edwards  
Special Master